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AT 8:30 M
WILLIAM T. WALSH
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CLEAN OCEAN ACTION, a New Jersey,
non-profit corporation; THE AMERI-
CAN LITTORAL SOCIETY, a New Jersey
non-profit corporation, FISHER-
MAN'S DOCK COOPERATIVE, INC., a
New Jersey corporation, and
UNITED FISHERMAN'S ASSOCIATION,
a New York non-profit corporation;
THE CONFEDERATION OF THE
ASSOCIATION OF ATLANTIC CHARTER-
BOATS and CAPTAINS, INC., a New
York Corporation.

: UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

: CIVIL ACTION NO.: 93-2402
(DRD)

Plaintiffs,

v.

VERIFIED COMPLAINT
FOR DECLARATORY
JUDGMENT AND
INJUNCTIVE RELIEF

COLONEL THOMAS A. YORK, in his
capacity as District Engineer of
the United States Army Corps of
Engineers; GENERAL STANLEY T.
GENEGA, in his capacity as
Director of Civil Works of Army
Corps of Engineers; ARMY CORPS OF
ENGINEERS, an agency of the
United States; CAROL M. BROWNER,
in her capacity as Administrator
of the United States Environmental
Protection Agency; WILLIAM J.
MUSZYNSKI, in his capacity as
Acting Regional Administrator of
the United States Environmental
Protection Agency; ENVIRONMENTAL
PROTECTION AGENCY, an agency of
the United States; the PORT
AUTHORITY OF NEW YORK AND NEW
JERSEY, a bi-state governmental
agency,

Defendants.

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Plaintiffs, Clean Ocean Action ("COA"), a New Jersey non-profit corporation with offices at 18 Hartshorne Drive, Sandy Hook, Highlands, New Jersey, The American Littoral Society ("ALS") a New Jersey non-profit corporation with offices at Sandy Hook, Highlands, New Jersey, Fisherman's Dock Cooperative, Inc. ("COOP"), a New Jersey corporation with its offices at 57 Channel Drive, Point Pleasant, New Jersey, and the United Fisherman's Association ("UFA"), a New York non-profit corporation with offices at 64 Tynan Street, Staten Island, New York, by way of complaint against the Defendants say:

I. PRELIMINARY STATEMENT

1. This is an action for declaratory judgment and injunctive relief. Plaintiffs challenge certain actions of defendant Army Corps of Engineers (the "Corps") in issuing a permit "number 91-1028-OD (Reinstatement)" (the "Permit") on May 26, 1993, pursuant to Section 103 of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. sec. 1401 et seq, authorizing defendant Port Authority of New York and New Jersey (the "Port") to dispose of contaminated dredge spoils from the area of the Newark/Elizabeth Marine Terminal into the waters of the Atlantic Ocean, six miles east of New Jersey. Plaintiffs also challenge the failure of defendant Environmental Protection Agency ("EPA") to disapprove the disposal operation. Defendants' actions violate Federal laws and regulations enacted to protect human health, the marine environment, water quality, aquatic

ecosystems and economic potentialities .

2. This action arises under and alleges violations of the National Environmental Policy Act, 42 U.S.C. Sec. 4321 et seq., the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. Sec. 1401 et seq., and the Administrative Procedure Act, 5 U.S.C. Sec. 501 et seq.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. Secs. 1331 (Federal question), 2201 (declaratory relief), and 2202 (injunctive relief); the Administrative Procedure Act, 5 U.S.C. Sec. 701 et seq. and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1401 et seq. and 33 U.S.C. 1415(g).

4. Venue is proper in this Court under 28 U.S.C. Sec. 1391 (b) and (e).

III. PARTIES

5. Plaintiffs in this action are:

A. Clean Ocean Action ("COA"), organized in 1984, as a broad-based coalition of over 140 conservation, fishing, boating, civic, realty and educational groups, over 300 New Jersey businesses and 1,000 citizens concerned with issues affecting ocean water quality. COA has been involved in ocean dumping issues for nearly a decade and has been an active participant in legislative aspects of attempts at regulating dredged sediment disposal. It has taken a lead role on behalf of

the public and environmental organizations in advising the Corps and other regulatory officials of the perils related to the issues herein. Although the Corps has not complied with legal requirements that it incorporate the public into the process leading to the issuance of the Permit, it has consulted and met with representatives of COA with regard to same. Many members of COA fish in, consume fish from and use the waters in the area surrounding the proposed dumping site as set forth in the Permit and will be adversely affected by the dredging and disposal of the dredged spoils allowed by the Permit.

B. The American Littoral Society (ALS), consists of more than 8,000 commercial and recreational fishermen, divers, swimmers, and boaters dedicated to protecting coastal habitat and fish that inhabit the waters off the coast of New Jersey and elsewhere. The goal of ALS is to encourage the study and conservation of marine life and its habitat, especially in the coastal zone. The ALS monitors coastal development in New Jersey, including all permits for dredging. Representatives of the ALS have been actively involved in meeting with and advising the Corps and other regulatory agencies regarding the hazards and perils related to the issuance of the Permit herein. Many members of ALS fish in, consume fish from and use the waters in and surrounding the proposed dumping site (the "dumping site") as set forth in the Permit and will be adversely affected by the dredging and disposal of the dredged spoils as allowed by the Permit.

C. The Fisherman's Dock Cooperative, Inc. (the "COOP") includes amongst its members 17 commercial fishermen operating 20 boats berthed in Point Pleasant, New Jersey. The COOP sells fish caught off the New Jersey Coast, including fish caught in and surrounding the dumping site. These fish include squid, whiting, bluefish, fluke, mackerel and weakfish. These fish are sold to wholesale customers along the East coast from North Carolina up to Canada. Any harm to the fish in and around the dumping site would have a severe and negative economic impact upon the COOP and its members and they will be adversely affected by the issuance of the Permit.

D. The United Fisherman's Association of New York State, Inc. (UFA) consists of approximately 8500 commercial and recreational fishermen, wholesale and retail purveyors, and citizens concerned with preserving the health of fish and fish habitat in the Atlantic Ocean, including particularly fish caught in and about the dumping site. Any harm to the fish in and around said area would have a severe and negative economic impact upon UFA and its members and, they will be adversely affected by the issuance of the Permit.

E. The Confederation of the Association of Atlantic Charterboats and Captains, Inc. (CAACC) consists of Charterboat Associations from New York, New Jersey, Rhode Island, Massachusetts, and Virginia. Many of its members consistently fish at the Mud Dump Site. Some of its members fish exclusively at the Mud Dump Site. Any harm to the fish in and around said

area would have a severe and negative economic impact upon CAACC and its members and they will be adversely impacted by the issuance of the Permit.

6. Defendants in this action are:

A. Colonel Thomas A. York, District Engineer of the New York District of the United States Army Corps of Engineers. Defendant York issued the Permit. He is responsible for the enforcement of and compliance with Section 103 of the Marine Protection, Research and Sanctuaries Act. He is named as a defendant in his official capacity.

B. General Stanley T. Genega, Director of Civil Works, U.S. Army Corps of Engineers is responsible for insuring that the Corps complies with Section 103 of the Marine Protection, Research, and Sanctuaries Act. He is named in his official capacity.

C. The Army Corps of Engineers, an agency of the United States, is responsible for implementing section 103 of the Marine Protection, Research, and Sanctuaries Act and is the agency which granted the Permit.

D. William J. Muszynski, Acting Regional Administrator of the Environmental Protection Agency (EPA). Defendant Muszynski is directly responsible for supervision of EPA's enforcement of and compliance with section 103 of the Marine Protection, Research, and Sanctuaries Act in Region II, which includes New Jersey. He is named as a defendant in his official capacity.

E. Carol M. Browner, Administrator of the EPA, is responsible for insuring that EPA enforces and complies with Section 103 of the Marine Protection, Research, and Sanctuaries Act. She is named in her official capacity.

F. The Environmental Protection Agency, ("EPA") an agency of the United States, is responsible for insuring that the requirements of Section 103 of the Marine Protection, Research, and Sanctuaries Act are met.

G. The Port Authority of New York and New Jersey (the "Port") is the permittee of the Permit and the party that will conduct and/or contract for the dredging and disposal operations authorized in conjunction with the Permit.

IV. FACTUAL ALLEGATIONS

A. Background

7. On May 26, 1993, the Army Corps of Engineers, without objection by the Environmental Protection Agency, granted the Permit to the Port pursuant to section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, ("MPRSA") as amended (33 U.S.C. section 1413) to dispose of contaminated dredge spoils in the Atlantic Ocean. A Copy of the Permit is attached as Exhibit A in the documents accompanying this Complaint.

8. The Permit would allow the Port to dredge approximately 500,000 cubic yards of contaminated sediments from the Port's facility in Newark Bay, Essex and Hudson Counties, New Jersey. The Permit authorizes the disposal of the contaminated sediments

at the Mud Dump Site, (also known as the Mud Buoy) one of the most productive fishing grounds in the New York-New Jersey area, located six miles from the coast of New Jersey approximately due east of the Borough of Sea Bright in Monmouth County. This dredging and disposal operation is part of the Port's "maintenance operations" to maintain and deepen berthing areas in the area of the Newark/Elizabeth Marine Terminal.

9. The Permit authorizes the Port to make a final deposit of one meter of clean sand over the disposal mound. The theory of the Corps is that the "cap" of the contaminated sediments will permanently isolate them from the marine environment.

10. The Permit authorizes the dredging of up to 500,00 cubic yards of sediment from the Port Authority's Newark/Port Elizabeth facility and subsequent ocean disposal of the sediment at the Atlantic Ocean disposal site known as the Mud Dump Site.

11. The Mud Dump Site is an area where fish tend to congregate and feed because of its close proximity to the Hudson Raritan Estuary. It is one of the most popular fishing spots in the New York-New Jersey area, particularly for bluefish. Other fish common to the Mud Dump Site are false albacore, various species of ling, whiting, butterfish, scup, lobsters, winter flounder, black sea bass, and weak fish.

12. The Permit authorizes the dredging of Reaches B, C and D of the Port Authority's Port Elizabeth/Port Newark facility, all of which are located in Newark Bay. Sediment samples from these Reaches demonstrate that sediment to be dredged and ocean

disposed contain a variety of contaminants, including cadmium, polychlorinated biphenyls, arsenic, lead, mercury, zinc, petroleum hydrocarbons, and 2,3,7,8-tetrachlorodibenzodioxin ("dioxin"). Benthic (bottom-dwelling) organisms sampled from these Reaches contain levels of dioxin as high as 10.54 ppt. Studies unrelated to this Permit have determined that blue crabs from Newark Bay are highly contaminated with dioxin and contain levels as high as 630 ppt. Because of their mobility, it is expected that crabs with similar dioxin levels are present in Reaches B, C and D.

13. Dioxin is one of the most toxic substances known. It is a powerful reproductive toxin at low doses to fish, birds, and mammals, including humans, and is considered by many toxicologists to be perhaps the most toxic synthetic chemical ever developed. It has been shown to be acnegenic (causes skin disorders) embryolethal (lethal to developing embryos), teratogenic (causing fetal malformations or monstrosities), in certain organisms and carcinogenic (causing cancer). It affects the immune responses in mammals and has been shown to bioaccumulate in aquatic organisms by factors as high as 8,000 fold.

14. Prior to March 1992, there were no numerical bioaccumulation criteria for dioxin to allow for the disposal of dioxin contaminated sediments into the ocean. Such criteria were developed by the New York District Army Corps of Engineers ("Corps NYD") and EPA Region II, to accommodate the Permit. The

criteria were never published for public comment or adopted pursuant to the rule making power and requirements imposed on the agencies involved herein. These are the first such criteria developed in the United States and the Mud Dump Site will be the first designated ocean disposal site for known dioxin-contaminated materials. Consequently, this Permit, the criteria used for issuance and the associated Management and Monitoring Plan are precedent setting and of potentially broad significance and application. There are approximately twenty (20) pending permits for Newark Bay dredging that involve the dumping of additional dioxin contaminated dredge spoils.

B. Chronology of Events/Significant Documents

15. Dioxin contamination of the sediments and marine organisms in the area of Port Newark/Elizabeth and Newark Bay was documented as early as 1982-83 by a U.S. EPA Survey. In 1985, the New Jersey Department of Environmental Protection and Energy ("N.J. DEPE") conducted a study of dioxin contamination of Newark Bay. The study found levels of dioxin as high as 620 parts per trillion ("ppt") in blue crabs and 56 ppt in striped bass fillets. Because these levels were in excess of the acceptable U.S. Food and Drug Administration recommendations, the consumption of fish and shellfish was banned in 1985.

16. That study and the need to widen and deepen the Kill Van Kull and Newark Bay Federal navigation channels prompted meetings between the Corps NYD and the EPA Region II to discuss the ocean disposal of dredged materials containing dioxin. These

meetings in turn prompted the establishment of an Interagency Dioxin Steering Committee (the "Committee"). The Committee's purpose was to review technical information concerning dioxin, to develop a bioaccumulation test for dioxin and to develop a criteria to assess the suitability of allowing dioxin-contaminated sediments to be disposed at the Mud Dump Site. Member agencies were EPA, the Corps NYD, the U.S. Fish and Wildlife Service ("FWS"), the National Marine Fisheries Service ("NMFS"), the New York State Department of Environmental Conservation ("N.Y. DEC") and the N.J. DEPE.

17. In 1990, the Corps proposed criteria for the ocean disposal of dioxin contaminated sediments. Based on bioaccumulation rates of dioxin in test organisms, the criteria would have allowed ocean disposal of sediments with a bioaccumulation potential between 1 and 25 ppt. If sediments had a bioaccumulation potential between 4-25 ppt, the material was to be capped. If the bioaccumulation potential was between 1-4 ppt, the material could be disposed without capping. If dioxin levels in test organisms were determined to be at or greater than 25 ppt, ocean disposal would have been prohibited.

18. These criteria were the subject of three Committee meetings held in May and July and September of 1991. The minutes of these meetings indicate that the other member agencies did not agree with the Corps' conclusion that the proposed criteria were protective of the environment. An agreement as to appropriate criteria for dioxin disposal was never reached among the member

agencies and September 11, 1991, was the last time the Committee met.

19. On November 25, 1991 the Corps issued Public Notice Number 14515-91-1028-OD (the "Public Notice") for the Permit project. Despite the Committee's failure to agree with the Corps' criteria, and thus the non-existence of such criteria, the Public Notice stated that the proposed dredging met "the current interim guidelines for dioxin" and that the Committee had agreed that sediments producing dioxin bioaccumulation of greater than 4 ppt would require de facto capping (the continuous placing of layers of sediment over one another to limit organism activity and cover the most contaminated material). The Public Notice did not describe what the current ocean disposal interim guidelines were, nor were they released at any time for public comment.

20. In letters from the EPA on December 12, 1991, from the N.J. DEPE on November 12, 1991, and from the FWS on December 13, 1991, they advised the Corps respectively, that the criteria described in the Public Notice "are too liberal to be reasonably protective of the marine environment", that the criteria "should be tightened" and that they were "unable to support the dioxin interim guidelines". Nevertheless, the Corps did not retract the above referenced statements in the Public Notice and at a February 1992 public hearing continued to mislead the public with the notion that the Committee had agreed to the criteria.

21. In and about March, 1992 the Corps and EPA issued a Management and Monitoring Plan for the Disposal of Dioxin

Contaminated Sediments (the "Initial Management Plan"). The Initial Management Plan established interim criteria for dioxin sediment as being based on test results from a 28-day bioaccumulation analysis. It stated that sediment which causes tissue to bioaccumulate dioxin from 1 to 10 ppt must be capped within 14 days; sediments which caused bioaccumulation from 10 to 25 ppt required capping within 10 days; and sediments which caused bioaccumulation equal to or greater than 25 ppt could not be ocean disposed. It also stated that these criteria would be in effect for a period of 12 months and that the Corps and EPA had no way of knowing how many more projects with dioxin contaminated sediments would require disposal during that period of 12 months.

22. On November 25, 1992 a meeting was held between representatives of Plaintiffs, COA and ALS, and defendants the Corps, EPA and the Port, and others, including N.Y. DEC, N.J. DEPE, and Dr. Angela Cristini ("Dr. Cristini") of Ramapo College, a biologist who had studied the effects of dioxin on marine life in Newark Bay and had previously been retained as a consultant by the N.J. DEPE for that purpose. Despite the urgings of representatives of Plaintiffs and Dr. Cristini, who presented the results of her studies showing the hazards of dioxin exposure to marine life, the representatives of the Corps and EPA stated that the criteria and the Initial Management Plan would not be released for public comment or peer review. They indicated that they would accept comments on the criteria and plan from the

Plaintiffs present but not seek comments from others. At that meeting, representatives of the Corps stated that there are at least 20 other pending projects involving dioxin-contaminated sediments from the Newark Bay area that were already in the permit process.

23. By letter dated December 9, 1992, the U.S. Fish and Wildlife Service ("USFWS") recommended denial of the Permit. The USFWS noted that the project had great potential to impact adversely federal trust fish and wildlife resources and their supporting ecosystems. Further, the USFWS stated that it did not believe there was sufficient information to conclude that the dredge spoils from this project met the ocean dumping criteria established by 440 CFR section 227(B) of MPRSA.

24. After meeting with the Corps, the USFWS noted by letter dated December 24, 1992 that the Corps still had not answered its concern for the danger posed to fish and wildlife resources from the proposed project. Specifically, the USFWS had asked over the year how the dioxin disposal criteria were defended scientifically and therefore, how they were determined to be protective of fish and wildlife resources. Despite this unanswered question, the USFWS stated that it no longer objected to the issuance of the Permit as long as the Committee was reconvened to allow input into the Management Plan and that data collected according to the Plan was used to complete a risk assessment before any additional dredging projects involving dioxin moved forward.

25. By letter to Defendant York dated December 31, 1992, Constantine Sidamon-Eristoff, then EPA Regional Administrator, stated that there was some question as to whether there was sufficient scientific information available to establish 25 ppt as an appropriate ocean disposal criterion and lowered the upper limit from 25 ppt to 10 ppt on an interim basis. The letter noted that EPA was conducting a national reassessment of the potential risks of dioxin, which should provide further guidance on the acceptability of the 25 ppt limit. He then concluded, without any reference to the Ocean Dumping regulations, 40 C.F.R. 220 et seq., that "this level of contamination will not result in significant health risks."

26. On January 6, 1993, the Corps issued a permit (the "Initial Permit") for the project that would have allowed the Port to dredge and ocean dispose of up to 500,000 cubic yards of sediment, a figure more than twice that stated in the November 1991 Public Notice.

27. The Corps simultaneously released an Environmental Assessment for the proposed permitted project concluding that neither an Environmental Impact Statement ("EIS") nor a supplemental EIS was warranted. The Corps chose instead to rely on a 1983 EIS prepared for the Mud Dump Site which contained no information about dioxin. The basis for this conclusion not to do an EIS was the fact that the identity of a different contaminant, dioxin, was the only factor not already considered by the prior EIS. Because the Environmental Assessment was

issued at the same time as the Initial Permit, the general public once again had no opportunity for input or comment.

28. By letter dated January 11, 1993, N.J. DEPE concurred with the Corps' decision to issue the Initial Permit but noted that "the continued disposal of dredged material containing dioxin may represent an especially significant long-term environmental threat." The N.J. DEPE Commissioner also noted his concern that the Corps and EPA were setting standards for dioxin disposal in the ocean through permit decisions, rather than through procedures that included peer review and public input, and requested both agencies to "initiate a formal rule making process to establish proper, scientifically based standards for the disposal of dredged material contaminated with dioxin."

29. On January 13, 1993, EPA Regional Administrator Sidamon-Eristoff withdrew EPA's assent to the Initial Permit and concluded that, because of the excess 300,000 cubic yards written into the Initial Permit, the material was unacceptable for ocean disposal. EPA officially objected to the disposal of the material at the Mud Dump site until it was demonstrated that either the bottom profiles of the berthing areas were unchanged in terms of sediment volume or that the levels of dioxin in the sediment were the same as when the Port initially applied for a disposal permit.

30. Because of EPA's objection, on January 14, 1993 the Corps suspended the Initial Permit.

31. EPA held a conference on dredging and disposal of New

York and New Jersey Harbor sediments on January 27 and 28, 1993. Topics included the Initial Management Plan, decontamination techniques, the impact of a December 11, 1992 Northeaster on the Mud Dump Site and the Diamond Shamrock superfund site, which is located on the Passaic River upstream of Newark Bay and is considered to be the main source of dioxin contamination in the New York-New Jersey harbor area. The Port gave a lengthy demonstration to show that the project did not require the removal of 500,000 cubic yards of sediment as stated in the Initial Permit, but required the removal of only 260,000 cubic yards of sediment.

32. At the conference, Plaintiff COA presented a proposal to temporarily store the sediment in vessels until an EIS could be conducted that included a review of the criteria, the Management Plan and a serious review of alternatives to ocean disposal. Since then, several meetings on this subject have taken place between the Corps, the Port, the N.J. DEPE, the Coast Guard, COA and representatives of the Environmental Defense Fund, another public interest environmental group which had disapproved of the issuance of the Permit.

33. By letter dated February 2, 1993, NMFS urged EPA to request that the Corps supplement the generic 1983 EIS or produce a new EIS on the proposed dioxin dredge and disposal projects. Subsequently, NMFS determined that the Permit must undergo an Endangered Species Act consultation to assess harm to endangered species that seasonally inhabit the proposed dioxin disposal

area, i.e. the Mud Dump Site.

34. In February 1993 the Corps and EPA requested that the Port retest each of the areas proposed to be dredged in conjunction with the Permit to determine if the quantities of dioxin in the sediments had changed since the Permit was applied for in 1991.

35. By letter dated March 12, 1993, the Port submitted the results of bulk chemistry sediment tests of the area to be dredged which showed decreased readings in the bulk sediment tests but the Port did not conduct or submit new bioaccumulation tests which if taken may not have shown any decrease in dioxin levels.

36. On March 18, 1993 Plaintiffs obtained a copy of a Corps bathymetric report analyzing the physical status of the Mud Dump Site subsequent to the December 11, 1993 Northeaster. The report prepared by Science Applications International Corporation ("S.A.I.C") clearly demonstrates that sediment previously disposed of at the Mud Dump Site did not remain in place and thus was dispersed into the marine environment by storm events; that more than 227,000 cubic yards of sediment from other areas were "lost" due to erosion and transport by storms; that more than 260,000 cubic yards of material previously disposed of at the Mud Dump Site is unaccounted for; and that the Corps does not know if this is due to the fact that the material never hit its mark or because of erosion by strong currents.

37. On March 29, 1993, in response to the Port's March 12,

1993 analysis of the area to be dredged, the Defendant Muszynski, the Acting Regional Administrator of the EPA, determined "...that the material to be dredged and disposed has been properly characterized and is suitable for ocean disposal". He made no reference to any specific regulation for his authority to act and made no specific findings under the regulations controlling ocean dumping of contaminated materials. In response to the S.A.I.C. report, EPA added that additional controls would be necessary to "minimize the Permit's potential for adverse affects occurring should a major coastal storm occur" during the project. The proposed controls included requiring the final capping plan to identify all equipment needed and its availability; dividing the disposal into 30 day phases and covering each completed phase with a final cap; and identifying a source of immediately available sand in case a major coastal storm arises during dumping. Defendant Muszynski noted that EPA's approval of the project was contingent on the Corps consultation with the NMFS, pursuant to the Endangered Species Act.

38. The NMFS completed the Endangered Species Act consultation on May 12, 1993. The purpose of the consultation was to answer the limited question of whether the proposed disposal was likely to jeopardize the continued existence of an endangered or threatened species. NMFS approved the project with recommendations but in doing so concluded in its report that "the environmental significance of bioaccumulation of petroleum hydrocarbons is, at present, undetermined", "the environmental

significance of bioaccumulation of dioxin is not yet understood" and "bioaccumulation of contaminants in endangered species cannot be adequately evaluated until more information is obtained...".

39. On May 18, 1993 Dr. Nancy Foster, Acting Administrator for Fisheries, National Marine Fisheries Service, advised General Stanley T. Genga, Director of Civil Works for the Corps, of the dangers of dumping dioxin sediments in the ocean to marine and human life, that because of uncertainty as to long term effects the Corps had to expand the information base, and the Corps needed verifiable information concerning long term effects of the dumping before issuing permits. She urged denying permits if information on the long term effects was not available.

40. On May 26, 1993 the Corps issued the Permit, which included twenty-five special conditions ("Special Conditions"), a "Monitoring and Management Plan for the Disposal of Dioxin Contaminated Sediments" (the "Final Management Plan"), a "Disposal Strategy for Contaminated Dredged Material" ("Disposal Strategy") and a "Capping Strategy for Contaminated Dredged material" ("Capping Strategy").

41. The Permit authorizes the maintenance dredging of up to 500,000 cubic yards of material from berths at Port Newark/Port Elizabeth in the Cities of Newark and Elizabeth, Hudson and Union Counties, New Jersey.

42. The "Special Conditions" require that disposal can only occur for a maximum of 30 days before a sand cap must be placed over the dredged material. Cap placement must occur within 10

days of the end of disposal. If disposal is interrupted for more than 5 days, a sand cap must be initiated. A final sand cap must be no less than 1 meter thick. The "Final Management Plan" describes the monitoring effort to be conducted by the Corps/EPA during a 12-month period, starting with the initiation of the first permitted disposal of dioxin-contaminated dredged materials. Prior to any disposal, baseline information was collected. For each disposal project (except the first), bathymetric and sediment profile imagery data must be collected prior to disposal. Between disposal and sand cap placement and during sand cap placement, bathymetric and sediment profile imagery data will be collected. Following cap placement, data will be collected to assess effectiveness of capping and thickness of cap. At the end of 12 months, sediment cores will be taken to measure dioxin in dredged materials and in the cap. Also, data analogous to data collected for baseline information will be collected. A Conditional Action Plan is also described to be followed in case of storm events. The "Disposal Strategy" requires that dredged materials be directed in 3 lanes in order to construct a low relief triangle, more than 5 feet high. The "Capping Strategy" requires that upon determination of the final mound configuration, a base map will be formed over which a series of lanes will be placed. Disposal scows with sand (for the cap material) will be assigned to disposal lanes.

IV. CAUSES OF ACTION

FIRST CAUSE OF ACTION

THE CORPS' FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT.

43. The National Environmental Policy Act (NEPA) requires the preparation of an Environmental Impact Statement (EIS) for all "...major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332.

44. The preparation of an EIS is designed to "...make sure that agencies act according to the letter and spirit" of the law. 40 C.F.R. 1500.1. Paramount to this purpose is NEPA's requirement "that environmental information is available to public officials and citizens before decisions are made and before actions are taken" because "accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. 1500.1(b)

45. An EIS was required for the issuance of the Permit because it was a "major" action that will "significantly" affect the quality of the human environment. 42 U.S.C. 4332. Under NEPA, the approval of a project by issuance of a Federal permit is considered a "major" Federal action. 40 C.F.R. 18(b)(4). Because the issuance of the Permit involves affects on the quality of the human environment which are likely to be highly controversial, are highly uncertain, or involve unique and unknown risks, and the action of issuing the Permit may establish a precedent for future action or represent a decision in

principle about a future decision, the issuance of the Permit was one "significantly affecting the quality of the human environment."

46. NEPA also requires that an agency supplement an existing EIS if "the agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c)(1).

47. The Corps concluded that neither an EIS nor a supplemental EIS was required for the Permit and chose to rely on an older 1983 EIS prepared for prior disposal projects at the Mud Dump Site. This decision was based on the Corps conclusion that "...[T]he identity of a different contaminant [dioxin] is the only factor not already considered by a prior EIS." This decision was embodied in an Environmental Assessment ("EA") dated January 6, 1993 which erroneously, arbitrarily and capriciously concluded that the issuance of the Permit would not significantly affect the quality of the human environment.

48. While just the newly found presence of dioxin would require a new EIS, there are at least five new and significant factors associated with the Permit that are directly relevant to environmental concerns and that render the 1983 EIS inadequate and obsolete. They are as follows:

A. The Permit represents the first ocean disposal of sediment containing detectable levels of dioxin. Therefore, it

'is' the first agency attempt at regulating ocean disposal of dioxin and will serve to legitimize the ocean dumping of dioxin-contaminated sediments.

B. In order to "legally" dump the sediment, the Corps and EPA developed dioxin bioaccumulation criteria, the first such criteria established in the United States. Consequently, the issuance of the Permit based upon the newly established criteria will not only establish the criteria for the Permit but will likely establish a national precedent. In addition, the criteria will set a regional precedent for approximately 20 pending permits that require the ocean disposal of dioxin-contaminated sediments.

C. The Corps and EPA had developed the Initial Management Plan, and then the Final Management Plan, for the disposal of dioxin contaminated sediments. Supposedly, this is a pioneering effort to mitigate the hazards of the contaminated sediment to be disposed under the Permit, will reduce the impacts of dredging and disposal of the dioxin-contaminated sediments, attempt to ensure that unacceptable adverse impacts to local resources are quickly recognized and dealt with and attempt to establish the ultimate acceptability of ocean disposal of dioxin-contaminated sediments.

D. The recent S.A.I.C. bathymetric (i.e. of the contours of the ocean bottom) survey documenting significant sediment loss at the Mud Dump Site in the December 1992 Northeaster has now prompted the Corps to abandon its prior ocean

dumping protocol. The survey, conducted after the December 11, 1992 Northeaster, led the Corps to determine that the decade-long practice of point dumping sediment in 25-30 foot mounds is no longer acceptable. Instead, a new method of dumping, which was hastily developed, will be implemented for the first time under the conditions of the Permit.

E. Because of the dioxin contamination, the Permit is the first to incorporate a condition and requirement of "no barge overflow". Under this condition, any water that is inadvertently dumped into a barge at the dredge site must remain in the barge until it has reached the Mud Dump Site. Arbitrarily, this restriction has been placed on only one-third of the total number of bargeloads required under the Permit.

49. The presence of dioxin, the dioxin bioaccumulation criteria, the Monitoring and Management Plan, the new dumping method and the no barge overflow restriction were not discussed in the 1983 EIS that the Corps chose to rely on because they did not exist at that time. It is legally required under NEPA and it is essential that an EIS be prepared to subject each of the new factors including the presence of the dioxin, the criteria, and each of the proposed mitigation efforts to public scrutiny and the review of other agencies before a decision is made to implement them and before the disposal takes place.

50. The actions of the Corps in failing to require an EIS or a supplemental EIS for issuance of the Permit is subject to judicial review under 5 U.S.C. 706(2)(A) which empowers Federal

Courts to hold unlawful and set aside agency actions, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

SECOND CAUSE OF ACTION

THE MATERIALS TO BE OCEAN DUMPED UNDER THE PERMIT CONTAIN PETROLEUM HYDROCARBONS AND DIOXIN WHICH IS A CARCINOGEN, AND TEROTOGEN WHICH MAY NOT BE OCEAN DUMPED OTHER THAN AS TRACE CONTAMINANTS OR ON AN EMERGENCY BASIS

51. The Marine Protection, Research, and Sanctuaries Act (MPRSA) regulates the dumping of all types of material into ocean waters. 33 U.S.C. 1401. Under MPRSA, ocean disposal of dredged materials is overseen by both the Corps and the EPA. 40 C.F.R. 225. Prior to issuing a permit for dredged materials the Corps and EPA must make independent determinations that the proposed project meets the Ocean Dumping Criteria ("ODC") set forth in 40 C.F.R. 227.

52. The materials to be dumped under the permit contain petroleum hydrocarbons, a form of oil, and dioxin which is a known carcinogen and teratogen or suspected of being a carcinogen and teratogen by responsible scientific opinion. Accordingly, pursuant to 40 C.F.R. 227.6(a) the ocean dumping of same may not be approved as other than trace contaminants, or, on an emergency basis, or after it has been demonstrated that certain conditions have been proven to effectively show that neither human health or that of domestic animals, fish, shellfish, or wildlife are endangered or more specifically that the dredged material would be "non-toxic to marine life and non-bioaccumulation in the

marine environment upon disposal and thereafter".

53. It has not been demonstrated or determined in appropriate findings by the Corps or EPA that the petroleum hydrocarbons and/or the dioxin in the materials to be dumped under the permit meet any of the exceptions to 40 C.F.R. 227.6(a) and therefore the dumping of same is prohibited.

54. While the ocean dumping regulations provide for a waiver procedure for disposal of these aforesaid contaminants if they fail to meet the Ocean Dumping Criteria neither the Corps nor EPA ever acted to trigger the existing regulatory provisions providing for such a waiver from the bar to issuance of the Permit established by the provisions of 40 C.F.R. 227.6(a).

55. Accordingly, the issuance of the Permit for the materials containing petroleum hydrocarbons and dioxin, as constituent materials prohibited from ocean dumping, is void and of no effect.

THIRD CAUSE OF ACTION

THE ISSUANCE OF THE PERMIT BY THE CORPS WAS ARBITRARY, CAPRICIOUS AND NOT IN ACCORDANCE WITH THE LAW PURSUANT TO 40 C.F.R. 220 ET. SEQ., THE OCEAN DUMPING REGULATIONS.

A. Neither the Corps nor EPA made appropriate or sufficient findings as required by the MPRSA to allow the ocean dumping of "prohibited constituents" (i.e. dioxin)

56. Neither of the defendants Corps nor EPA made administrative findings sufficient to meet the standards required under any of sections 227.6(b)(f)(8) or (h) which set forth the

exclusions to allow the prohibited constituent materials to be ocean dumped.

57. In issuing the Initial Permit on January 6, 1993, (the Initial Permit was subsequently reinstated as modified in the Permit), Defendant York filed a Memorandum for the Record as a Statement of Findings and Environmental Assessment pertaining to the Permit. He stated as follows, at page 20:

The ocean disposal of dredged material is regulated by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency under the Marine Protection, Research, and Sanctuaries Act of 1972. The regulations and criteria (40 C.F.R. Parts 220-227) published in the Federal Register specify that dredged material may be disposed in the ocean provided that it is demonstrated to be "...non-toxic to marine life and non-bioaccumulative in the marine environment upon disposal and thereafter...." (Section 227.6(f)(1)).

58. Neither the Corps nor EPA made adequate findings to demonstrate, pursuant to the standard used by Defendant York, that the dredged material would be "...non-toxic to marine life and non-bioaccumulative in the marine environment upon disposal and thereafter."

59. Not only was there evidence before the Corps and the EPA to show that the dioxin laden material would be toxic to marine life and bioaccumulative in the marine environment, but there was insufficient evidence for the Corps or the EPA to make a proper administrative determination to the contrary.

B. Significant amounts of dioxin contaminated material will be released into ocean waters.

60. The possibility for bioaccumulation to occur in marine organisms is inherent in dioxin-based criteria adopted for the issuance of the Permit. The criteria establish that sediment containing a detectable bioaccumulation potential from 1 ppt up to 10 ppt can be ocean disposed if it is expeditiously capped. If the bioaccumulation potential is above 10 ppt it is absolutely barred from being ocean disposed. Consequently, sediment with a bioaccumulation potential of 1 to 10 ppt that is let free into the marine environment does not meet the ODC. It is only the mitigative measure of capping the material that purports to render the proposed dumping in compliance.

61. Studies of dredge-and-dump projects have concluded that up to five per cent of the total volume of sediment is suspended and "lost" to the water column during ocean disposal and will not be capped. Applying this known principle to the Permit project, if only 2.5% is "lost," 2.5% of 500,000 cubic yards, or 12,500 tons (1 cubic yard equals 1 ton) of dioxin-contaminated material will be dumped, and will not be capped. If the 5% figure is applied, then 25,000 tons of the dioxin contaminated material will float away from the disposal site and eventually settle to the bottom at some distance from the disposal site.

C. Bioaccumulation of dioxin occurs via a direct link to the food chain that the Corps and EPA failed to consider.

62. Field studies have revealed that clams and crabs of Newark Bay, including the area to be dredged under the Permit,

are highly contaminated with dioxin. Levels of 40 to 45 ppt were detected in the muscle tissue of these organisms and as much as 940 ppt were detected in the hepatopancreas (the combined area of the liver and pancreas or the "green gland" or "tomalley" of certain crabs). Fish consuming dioxin-contaminated organisms can be expected to assimilate approximately 10% of the contamination of the organisms they feed upon and will maintain this level of contamination in their fatty tissue. When sediments are dredged from Newark Bay, organisms such as worms, clams and crabs are taken up along with the sediment. Consequently, when this sediment is dumped into the ocean at the Mud Dump Site, the contaminated organisms are released there.

63. The dumping of the dredged materials also results in a "feeding frenzy", a situation in which fish swarm to the area in great numbers and feed directly on the contaminated worms, crabs, clams and other organisms as they fall through the water column.

64. Many of these fish that feed on the released contaminated organisms will subsequently be caught by recreational or commercial fishermen and consumed by the public. Because of the highly migratory nature of the fish that frequent the Mud Dump Site, it is typical for fish feeding at the Mud Dump Site to be caught not only in New York and New Jersey but as far south as Virginia, Maryland, the Carolinas and Florida and as far north as Massachusetts, Maine, New Hampshire and Canada.

65. Consequently, the dumping of dredged sediments from Newark Bay will not only expose, but actually attract, local and

migratory fish species to a dioxin saturated food source. These fish, whether caught commercially or recreationally, will eventually make their way to restaurants and dinner tables not only in New Jersey but from Canada to Florida. This possibility is even more likely because the disposal under the Permit will take place during the summer months, the period of highest activity at the Mud Dump Site in terms of abundance of fish.

66. This direct link between the activities authorized by the Permit and the human food chain was brought to the attention of both the Corps and EPA on several occasions, but it was not a factor weighed by the Corps in the development of either the dioxin bioaccumulation criteria or the Management Plan.

67. The disposal of the Newark Bay sediments to be dredged under the Permit creates the possibility of dangerous bioaccumulation and is prohibited under the ODC.

D. The Corps applied New York State's standard for human consumption of dioxin contaminated fish but did not apply the New York State standard established to protect wildlife.

68. The MPRSA regulations 40 C.R.F. 227.6(b) forbid the dumping of materials that will cause the possibility of danger associated with the bioaccumulation of oil of any kind or carcinogens, including petroleum hydrocarbons and dioxin, respectively, in marine organisms. In an effort to meet this requirement for the issuance of the Permit, the EPA and the Corps adopted and applied standards set by New York State for human consumption of dioxin tainted fish. This standard was a minimum of 10 ppt. However, the EPA and the Corps ignored the New York

State standard for protection of fish consuming wildlife that was set at 3 ppt. Because 40 CFR 227.6(b) requires that the standard be measured by effects of the bioaccumulation in marine organisms, or by effects on both human health and fish, shellfish or wildlife, the blatant failure of the EPA and Corps to adopt the standard that would protect fish-consuming wildlife was arbitrary, capricious and an abuse of discretion.

69. The FWS urged EPA and the Corps to adopt, or at least reasonably consider, the 3 ppt standard. Noting that this 3 ppt standard and several concerns about this project had not been addressed, the FWS stated, in a letter to the Corps dated December 9, 1992, that "it still views it necessary to...complete an ecological risk assessment that will...confirm the degree of biological protection offered..." by the selected criteria. This was not done.

70. In a letter dated December 24, 1992 the FWS stated "The Service specifically asked how the selected...criteria were defended scientifically, and therefore deemed protective of fish and wildlife resources...over one year ago...and definitive answers are still lacking." The FWS further stated that "...based on all the information provided by the [Corps] for this project ...insufficient information exists to determine if the proposed dredge material from this project satisfies the...criteria set forth in 40 C.F.R., section 227 (the ODC)".

71. Comments of the N.J. DEPE, in a letter dated January 11, 1993 regarding the criteria offered a similar view and

requested that "for future projects...the U.S. Environmental Protection Agency and the Corps of Engineers...initiate a formal rule-making process to establish proper, scientifically based standards for the disposal of dredged materials."

72. The Corps in a letter dated December 29, 1992 has admitted that "...the scientific data and literature that the Corps...and [EPA] use to establish criteria, particularly for dioxin, is sparse" and that "it is unknown to what extent, if any, the bioavailability of dioxin or other contaminants is increased during dredging and disposal operations." By its own admission, the Corps has failed to demonstrate that there is no danger from the issuance of the Permit of the possibility of the bioaccumulation of dioxin in marine organisms and thereby the threat to marine life and human health.

E. There is a strong possibility that bioaccumulation of petroleum hydrocarbons will occur.

73. Dredged materials proposed for ocean disposal must undergo liquid phase, suspended phase and solid phase bioassay tests to determine the extent of mortality that might occur due to exposure of marine organisms to the dredged material, as well as to determine whether the test organisms show significant accumulation of "contaminants of concern." 40 C.F.R. 227.6(C). The contaminants of concern include "oil of any kind or in any form". 40 C.F.R. 227.6(a)(4). Consequently, the Corps and EPA require that all sediments proposed for disposal be tested for petroleum hydrocarbons.

74. The bioassays include a comparison of test organisms that survive a 10-day exposure to the sediment to be disposed and organisms exposed to "background" sediment for 10 days. When the difference in accumulation between the organisms is statistically significant and greater than 10%, the accumulation level is compared to a pre-determined matrix value for that particular contaminant to determine if ODC is met.

75. The sediment tested for the Permit displayed statistically significant levels of bioaccumulation of petroleum hydrocarbons. However, the Corps and EPA have not yet developed a matrix value for petroleum hydrocarbons. Therefore, there is no way to determine the dredged material's potential for bioaccumulation of petroleum hydrocarbons in marine organisms is acceptable. Accordingly, the Corps has failed to show that there is no possibility of danger for marine organisms to bioaccumulate contaminants of concern.

F. Neither MPRSA nor the regulations adopted to implement it allow for proposed mitigation techniques to meet ocean dumping criteria.

76. The Corps and EPA had no authorization to rely on mitigating measures to meet the ODC. Sediments that contain prohibited constituents that do not meet stated exclusions are not eligible for ocean disposal under the ODC. The Corps and EPA have, without regulatory authority, made their own decision for the purpose of issuing the Permit and determined that such material can be ocean disposed if it is subsequently capped. In addition the Corps and EPA are purporting to implement the

capping strategy in the Final Management Plan devised for the Permit by assuming that, capping of the dioxin-contaminated sediments will isolate the contaminants from the marine environment.

77. The relationship between these measures was described by the EPA in an attachment to a letter dated June 15, 1990 to the Corps: "...The magnitude of [the dioxin exposure] risk is directly related to the effectiveness of the capping operation to minimize long term exposure. Therefore, the level of confidence that can be placed in this mitigation measure is directly dependent on the planning, operational and monitoring activities that would be incorporated into the capping program."

78. Neither the MPRSA nor the accompanying regulations provide for the use of mitigating measures as a means of meeting the ODC. Instead the ODC are clear in their mandate: if, through a series of biological tests, it can be demonstrated that otherwise prohibited (i.e. dioxin) sediment will not cause significant undesirable effects, including the possibility of danger associated with their bioaccumulation in marine organisms, the ODC are satisfied and the sediment can be dumped in the ocean; but if through biological testing on the solid phase, the possibility that significant undesirable effects will occur due either to chronic toxicity or to bioaccumulation of the constituents listed in 40 C.F.R. 227.6 (includes dioxin) is not ruled out, ocean disposal is prohibited.

79. Notwithstanding that the regulatory authority that does

not permit mitigation as a means to dump what is prohibited, the stated purposes of the Final Management Plan for the Permit are to "reduce the impacts of dredging and disposal of sediments contaminated with dioxin", "insure that unacceptable adverse impacts are quickly recognized and dealt with" and "establish the ultimate acceptability of ocean disposal of dredged material containing dioxin." The ODC bioaccumulation standard requires that these factors be considered and dealt with prior to disposal not after the material is dumped. Consequently, although the Corps used mitigating measures in order to try to meet the criteria, the Permit does not comply with the ODC.

G. The proposed capping provided for in the Permit and the Final Monitoring and Management Plan is unproven and experimental.

80. The possibility of bioaccumulation in marine organisms exists even if it is determined that mitigating measures can be used to meet the ODC. This possibility exists because it has not been demonstrated that either capping or the Management Plan will effectively accomplish their objectives.

81. Studies conducted at the Mud Dump Site do not support the degree of confidence that the Corps and EPA place in capping. The sole biological study conducted on a capped mound of dredged material, conducted by Koeppe et al. for the Army Corps of Engineers, New York District in 1982, was significantly flawed and does not support the Corps' premise that capping prevents bioaccumulation.

82. A chemical analysis was conducted by J.M. O'Conner for

the Research Foundation of the State University of New York in 1984 to determine the effectiveness of capping at isolating certain contaminants from the marine environment. The study demonstrated that capping is not completely effective at isolating PCBs from the environment. The effectiveness of capping as a means of isolating dioxin in the ocean has never been analyzed in a capping experiment.

83. The Final Monitoring and Management Plan is designed to monitor for large and gross effects that may not occur at the Mud Dump Site. However, the Plan does not provide for the detection of subtle and sublethal effects that are much more likely to occur. Consequently, the Plan will not be able to immediately detect and identify adverse impacts in time to effectively deal with them.

84. The Plan lacks adequate baseline monitoring data to determine what, if any, changes occur during the interim 12 month disposal period, nor does it limit the amount of material that will be ocean disposed. Consequently, it is not clear how the Plan will be able to determine the ultimate effectiveness of the dioxin disposal criteria or the Plan itself.

85. Consequently, it has not been demonstrated that either capping or the Monitoring and Management Plan will be effective at mitigating any of the danger associated with the bioaccumulation of dioxin in marine organisms in and around the Mud Dump Site.

86. Each of these six inherent problems of the Port

Newark/Port Elizabeth disposal project authorized by the Permit creates the possibility for marine organisms to bioaccumulate dioxin and petroleum hydrocarbons. Consequently, under the ODC, each of these problems on its own requires that the ocean disposal of this sediment be prohibited.

87. Accordingly, the issuance of the Permit by Defendant York was arbitrary, capricious and otherwise not in accordance with the law.

FOURTH CAUSE OF ACTION

THE CORPS AND EPA VIOLATED THE MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT BY ISSUING THE PERMIT FOR THE DISPOSAL OF MATERIAL CONTAINING DIOXIN FROM THE MANUFACTURE OF AGENT ORANGE WHICH IS STRICTLY PROHIBITED BY THE OCEAN DUMPING CRITERIA AS A MATERIAL PRODUCED FOR CHEMICAL WARFARE.

88. On information and belief dioxin contamination of Newark Bay is attributed to unauthorized releases of herbicides manufactured to make Agent Orange which was produced at the former Diamond Shamrock Plant situated on the Passaic River in Newark, New Jersey, upstream of Newark Bay and the Newark/Elizabeth Marine Terminal. Now a superfund Site, the Diamond Shamrock Plant was one of this country's largest manufacturers of Agent Orange (a combination of 2,4,5-trichlorophenoxy acetic acid and 2,4,5-Trichlorophenate) for use as a chemical defoliant during the Vietnam War.

89. Dioxin is an inadvertent contaminant formed during the manufacturing process of certain herbicides, and is therefore inevitably present in the herbicides themselves. Dioxin is a by-

'product of the manufacture of precursor chemicals of Agent Orange.

90. The ODC and MPRSA prohibit the disposal, under any circumstances, of "materials, in whatever form, (including without limitation, solids, liquids, semi-liquids, gases, or organisms) produced or used for radiological , chemical, or biological warfare." 40 C.F.R. 227.5. This prohibits the dumping of herbicide compounds intended for use in warfare activities.

91. Because, on information and belief, the dioxin to be disposed of under the Permit is a necessary by-product of the manufacture of Agent Orange and its disposal should be barred and the Permit voided.

FIFTH CAUSE OF ACTION

THE CORPS AND EPA VIOLATED THE ADMINISTRATIVE PROCEDURE ACT BY IMPLEMENTING THE DIOXIN BIOACCUMULATION CRITERIA WITHOUT PROVIDING FOR NOTICE AND COMMENT.

92. The APA defines an agency rule as meaning "the whole or part of an agency statement or general or particular applicability and future affect designed to implement, interpret, or prescribe law or policy..." 5 U.S.C. 551(4)

93. Exempt from the notice and comment requirements are "interpretive rules", which are general statements of policy, or rules of agency organization, procedure or practice..." 5 U.S.C. 553(b) (3) (A).

94. The dioxin bioaccumulation criteria as set forth in the Final Management Plan are "agency rules" and not "interpretive rules" as defined by the APA in that they are a statement of the Corps and EPA specifically applicable to proposed ocean dumping

projects and are designed to implement the MPRSA. Rather than making a general policy statement, the criteria prescribe a legal right. Applicants with projects that meet the criteria will be permitted; those with projects that do not meet the criteria will not.

95. Under the Administrative Procedure Act ("APA"), agency rules may be issued only after certain notice and comment procedures are completed. 5 U.S.C. 553. General notice of proposed rule making must be published in the Federal Register and must include "(a) A statement of time, place and nature of public rule making procedures; (2) reference to legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b).

96. The public did not have notice or an opportunity to comment on the dioxin bioaccumulation criteria. Consequently, by issuance of the Permit and adoption of the Final Management Plan, the EPA and the Corps violated the notice and comment requirements of the APA; and the rules as embodied in the Final Management Plan are invalid.

97. Because the issuance of the Permit was dependent upon adoption of the criteria in the Final Management Plan it is void and on no effect.

SIXTH CAUSE OF ACTION

THE CORPS VIOLATED ITS OWN REGULATION BY FAILING TO PROVIDE SUFFICIENT INFORMATION IN THE PUBLIC NOTICE.

98. In addition to the regulations specific to the MPRSA, the Corps has adopted its own General Regulatory Policies for processing Department of the Army (DOA) Permits. 33 C.F.R. 320 et seq. Pursuant to same, once an application for a DOA Permit has been reviewed and deemed complete, the District Engineer will issue a Public Notice. 33 C.F.R. 325.2.

99. The Public Notice is "the primary method of advising all interested parties of the proposed activity... and of soliciting comments and information necessary to evaluate the probable impact on the public interest." 33 C.F.R. 325.3 (a). Therefore, the notice "must include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment."

100. The Public Notice for the Permit was published on November 25, 1991. It contained several inaccuracies and false statements that misled the public as to the nature and magnitude of the proposed disposal.

On page 13 of the Public Notice the Corps stated:

"The interagency dioxin steering committee has agreed that ocean disposal of sediments producing dioxin bioaccumulation of greater than 4 parts per trillion would require de facto capping at the Mud Dump Site. Results of the bioassay/bioaccumulation testing indicate that the proposed dredge material does meet the current ocean disposal interim guidelines for dioxin, and can, therefore, be disposed of at the Mud Dump Site, with de facto capping.

101. In reality, there were no ocean disposal interim

'guidelines for dioxin disposal at that time and there was no agreement within the Interagency Dioxin Steering Committee (the "Committee") or between the Corps and EPA. Although the Corps had presented criteria to the Committee for consideration, the other member agencies were very much opposed. In a letter from the NJDEPE to the Corps, sent just three days before the Public Notice was issued, the NJDEPE noted its concerns in stating "...[Division of Science and Research] believed that accumulation of dioxin in aquatic organisms in the vicinity of the Mud Dump Site needs to be minimized to the greatest extent possible, and that the criteria proposed by Corps NYD should be tightened."

102. In a letter to the Corps dated December 12, 1991, more than three weeks after the public notice was issued, the EPA stated that the criteria "...are too liberal to be protective of the marine environment." "...[W]e find your approach disconcerting and are troubled by the apparent lack of consideration of our viewpoint and role in establishing review procedures for these materials."

103. In a letter to the Corps dated December 13, 1991, the FWS stated "The Service is disappointed to note that the interim guidelines do not differ in substance to proposed criteria contained in your June 1990 letter". ... "We note with concern that the criteria are substantially unchanged and that the Corps had not responded to the Service's July letter" which outlined concerns and recommendations pertaining to the criteria. "These actions suggest that the Corps is not interested in seeking the Services's support in establishing the interim guidelines". "...[T]he Service is

'unable to support the dioxin interim guidelines."

104. At the request of several citizens, a public hearing was held on February 4, 1992 to allow the public to comment on the project as described in the Public Notice. Despite the documented opposition to the criteria by the other members of the Committee, the Corps did not retract the statement in the Public Notice but chose to expressly continue to mislead the public. The hearing began with the comments of the Corps' District Engineer who stated that the "material complies with the criteria established by the Corps and the Environmental Protection Agency and is suitable for disposal at the designated ocean site if done so using the technique of capping."

105. This blatant disregard for their own regulations and for the Public's right to know the substance of a project in order to provide meaningful comments was arbitrary, capricious and not in accordance with the law. The Corps' misconduct is reviewable under 5 U.S.C. 702.

IRREPARABLE HARM AS TO ALL CAUSES OF ACTION

If the dumping at the Mud Dump Site is allowed to be conducted as provided in the Permit the Plaintiffs, the environment, and the general public will suffer immediate, substantial and irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Determine and declare that the Corps has violated the National Environmental Policy Act by failing to prepare an

Environmental Impact Statement or a Supplemental Environment Impact Statement.

2. Determine and declare that the Corps' decision to issue the Permit for the ocean disposal of dioxin contaminated material violated the Marine Protection Research and Sanctuaries Act.

3. Determine and declare that the EPA's failure to object to the Corps' unlawful issuance of the Permit is a violation of the Marine Protection, Research and Sanctuaries Act.

4. Determine and declare that the Corps and EPA have violated the Administrative Procedure Act by failing to utilize the rule making procedures under the Act to establish and adopt the dioxin disposal criteria and/or to provide proper public notice of its actions as required by law.

5. Determine and declare that Defendants' actions as set forth above are arbitrary and capricious, not in accordance with the law and not in accordance with procedures required by law, contrary to 5 U.S.C. Section 706(2) (A) and (D).

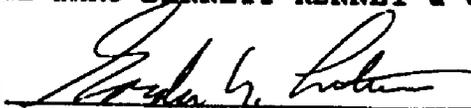
6. Issue a temporary restraining order and preliminary and permanent injunctions, as required, restraining the defendant Port Authority of New York and New Jersey, its agents and employees and all persons acting in concert and in participation with them and all defendants named herein from commencing any ocean disposal activities under the Permit unless and until defendants Corps and EPA comply with the Marine Protection, Research and Sanctuaries Act, the National Environmental Policy Act and the Administrative Procedure Act.

7. Award Plaintiffs their costs of suit and attorneys' fees incurred herein.

8. Grant such other and further relief as may be appropriate.

Dated: June 1, 1993

ANSELL ZARO BENNETT KENNEY & GRIMM

By: 

GORDON N. LITWIN

Of Counsel:
Linda B. Kenney, Esq.

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VERIFICATION

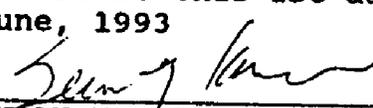
I, Cynthia A. Zipf being duly sworn upon my oath depose and say:

1. I am Executive Director of Clean Ocean Action, a plaintiff in the within action. I am familiar with all of the facts and circumstances alleged in the Complaint.

2. I have read the foregoing Complaint in its entirety and the facts therein alleged are true based upon my personal knowledge or as applicable in sworn statements to be filed with the Complaint or in responsible scientific opinion that I have reviewed.


CYNTHIA A. ZIPF

Sworn to and subscribed to
before me this 1st day of
June, 1993



SUSAN M. KENNEDY
An Attorney-at-Law of
New Jersey